IN THE SUPREME COURT
Appeal from the Court of Appeals
Honorable E. Thomas Fitzgerald, Janet T. Neff, and Helene N. White

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ALBERTA STUDIER, PATRICIA M. SANOCKI, MARY A. NICHOLS, LAVIVA M. CABAY, MARY L. WOODRING, and MILDRED E. WEDELL,

Plaintiffs-Appellants,

vs.

MICHIGAN PUBLIC SCHOOL EMPLOYEES RETIREMENT BOARD, MICHIGAN PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, MICHIGAN DEPARTMENT OF MANAGEMENT AND BUDGET, and TREASURER OF THE STATE OF MICHIGAN,

Defendants-Appellees.

Supreme Court
Docket No. 125765

Court of Appeals
Docket No. 243796

Ingham County Circuit Court
Case No. 00-92435-AZ

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BRIEF ON APPEAL—APPELLANTS'

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STATE OF MICHIGAN

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PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

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The Court of Appeals would answer "No."
The Ingham County Circuit Court did not address this issue.
Plaintiffs-Appellants would answer "Yes."
Defendants-Appellees would answer "No."

II. **DID THE COURT OF APPEALS ERR IN CONCLUDING THAT DEFENDANTS-APPELLEES' INCREASE OF THE CO-PAYS AND DEDUCTIBLES PAID BY PLAINTIFFS-APPELLANTS WAS NOT SIGNIFICANT ENOUGH TO SATISFY AN IMPAIRMENT OF CONTRACT ANALYSIS UNDER US CONST, ART I, §10 AND MICH CONST 1963, ART 1, §10?**

The Court of Appeals would answer "No."
The Ingham County Circuit Court did not address this issue.
Plaintiffs-Appellants would answer "Yes."
Defendants-Appellees would answer "No."

III. **DID THE COURT OF APPEALS ERR IN FAILING TO GRANT PLAINTIFFS-APPELLANTS' MOTION FOR SUMMARY DISPOSITION?**

The Court of Appeals would answer "No."
The Ingham County Circuit Court would answer "No."
Plaintiffs-Appellants would answer "Yes."
Defendants-Appellees would answer "No."

IV. **DID THE COURT OF APPEALS ERR IN AFFIRMING SUMMARY DISPOSITION IN FAVOR OF DEFENDANTS-APPELLEES WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED AND PLAINTIFFS-APPELLANTS WERE DENIED AN OPPORTUNITY TO OFFER PROOFS THROUGH DISCOVERY AND A TRIAL.**

The Court of Appeals would answer "No."
The Ingham County Circuit Court would answer "No."
Plaintiffs-Appellants would answer "Yes."
Defendants-Appellees would answer "No."

STATEMENT OF FACTS

A. Nature and Character of the Pleadings and Proceedings.

Plaintiffs-Appellants are seeking a declaratory judgment and injunctive relief. This action was commenced on September 21, 2000. At the time of filing their Complaint, Plaintiffs-Appellants also filed a Motion for Preliminary Injunction and supporting Brief.

The First Amended Complaint, filed by Plaintiffs-Appellants on October 2, 2000, alleged that certain increases in the drug co-pays and deductibles levied by Defendant-Appellee Michigan Public School Employees Retirement Board (hereinafter "Retirement Board") against Plaintiffs-Appellants pursuant to the health insurance plan of the Retirement Board, were violative of their rights under art I, §10 of US Const and art 1, §10 and art 9, §24 of Mich Const 1963. (*See* pp 58a - 71a of Plaintiffs-Appellants' Appendix.)[1]

The named Plaintiffs-Appellants are six retirees from Defendant-Appellee Michigan Public School Employees Retirement System (hereinafter "MPSERS").[2] They are a good representative cross-section of all retirees from MPSERS. Some were professional employees and some were support personnel employed by their respective public school employers. The Complaint was filed on behalf of each Plaintiff-Appellant and on behalf of all retirees of MPSERS. Although each retiree from MPSERS has in certain respects a different set of circumstances (different retirement incomes, different

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[1]Plaintiffs-Appellants' Appendix will hereafter be cited as "PA ___a."

[2]MPSERS was established by the Public School Employees Retirement Act of 1979, 1980 PA 300, being MCL 38.1301, *et seq*, hereinafter referred to as the "Retirement Act."

health conditions, etc.), the provisions of the health plan provided by MPSERS are, in all material respects, the same when applied to all retirees.

On February 21, 2001, after reviewing the Briefs and hearing oral arguments, the Trial Court issued its first Opinion (hereinafter "Opinion I") regarding Plaintiffs-Appellants' First Amended Motion for Preliminary Injunction. (PA 184a - 204a.) That Opinion made several holdings which will be discussed later, and included the following directive to the parties:

> The parties are directed to file affidavits and other documentary evidence of their choosing, and to file simultaneous briefs and reply briefs (one reply only) on the issue as to whether the changes imposed by Defendants and challenged in the present lawsuit constitute a significant impairment, as defined in this Opinion.

Pursuant to that directive, the parties filed further Briefs and Affidavits and the Trial Court heard oral argument on Plaintiffs-Appellants' Motion for Preliminary Injunction on May 25, 2001. In the Trial Court's second Opinion, dated August 28, 2001, (hereinafter "Opinion II") it denied Plaintiffs-Appellants' Motion for Preliminary Injunction. (PA 246a - 249a.) The final paragraph of that Opinion stated:

> The Court wishes to give the parties one more opportunity to narrow the factual issues (or even decide the case) prior to trial. The Court therefore invites the filing of C(10) motion or motions for summary disposition. If necessary, the Court will move the trial date to give the parties and the Court sufficient time to complete this motion process.

Following the Court's invitation, Plaintiffs-Appellants and Defendants-Appellees filed Motions for Summary Disposition, submitted Briefs and affidavits, and the Trial Court heard oral arguments on said Motions on April 5, 2002. In an Opinion dated August 29, 2002 (hereinafter "Opinion III"), Judge Lawrence Glazer

granted Defendants-Appellees' Motion for Summary Disposition and dismissed this action without costs. (PA 557a - 563a.)

Plaintiffs-Appellants timely appealed to the Michigan Court of Appeals the Trial Court's Opinion granting Defendants-Appellees' Motion for Summary Disposition. The Court of Appeals' panel, consisting of Judges E. Thomas Fitzgerald, Janet T. Neff, and Helene N. White, received Briefs, heard oral argument on January 20, 2004, and rendered an Opinion dated February 3, 2004, which is the subject of this appeal. (PA 567a - 577a.)

B. Historical Background.

Health insurance premiums for retired public school employees were first funded in the State of Michigan in 1975. Under 1974 PA 244, Section 27e, the Retirement Board paid "hospitalization and medical coverage insurance premiums . . . not to exceed $25 per month . . . ." That Act further specified that the premiums should be paid "only during those fiscal years for which an appropriation is made which is sufficient to cover the premium payments likely to be made for that year or on a terminal funding basis."

The Retirement Act was amended several times over the next few years. Each amendment increased the amount of the premium the State paid. In 1983, the Retirement Act was amended to provide that "[t]he Retirement System shall pay the entire monthly premium . . . ." 1983 PA 143.

In 1985, the statute governing health care benefits for retirees from MPSERS was amended extensively. While the State continued to pay the entire monthly premium for retirees' health benefits, that payment was no longer contingent on

a yearly appropriation. Instead, the statute required the Retirement Board to pay the entire monthly premium for any retirant or beneficiary receiving a monthly retirement allowance:

> The retirement system shall pay the entire monthly premium or membership or subscription fee for . . . a retirant or retirement allowance beneficiary who elects coverage in the plan authorized by the retirement board and the department.

See, 1985 PA 91, MCL 38.1391(1). (Emphasis added.)

Since the Legislature enacted 1985 PA 91, the above-recited language of Section 91(1) of the Retirement Act has remained unchanged.

Defendant-Appellee MPSERS was established pursuant to the Retirement Act. Section 22 of the Retirement Act, provides for the Retirement Board consisting of the State Superintendent of Public Instruction and 11 members appointed by the Governor with the advice and consent of the State Senate. MCL 38.1322.

MPSERS consists of all public school districts, intermediate school districts, public school academies, and community and junior colleges in the State of Michigan which are termed "reporting units," of which there are approximately 845. Members of MPSERS include all employees of the reporting units including, but not limited to, administrators, classroom teachers and other professional personnel, bus drivers, cooks, custodians, etc.

MPSERS has in excess of 300,000 members and approximately 140,000 retirees and beneficiaries who are entitled to the health benefit package provided by the Retirement Board to its retirees and beneficiaries pursuant to Section 91 of the Retirement Act, MCL 38.1391.

The health benefits plan provided to retirees pursuant to Section 91 of the Retirement Act is a comprehensive health benefit plan which includes broad hospital, medical-surgical, and sick care benefits, including prescription drugs. MPSERS provides, and from time-to-time has updated, a summary plan description informing retirees about their health benefits to which they are entitled. *See* PA 91a - 161a for the representative example of one of Defendant-Appellee Retirement Board's summary plan descriptions explaining the benefits to which retirees from MPSERS were entitled. As is true with essentially all group health insurance plans provided by the State of Michigan and by private companies in the State of Michigan, new benefits, procedures, and drugs are from time-to-time, by operation of the plan, added to the health benefit package.

The health plan is self-funded by MPSERS and is administered on a day-to-day basis for MPSERS by Blue Cross/Blue Shield of Michigan (hereinafter "BC/BSM") under a contract of administration between BC/BSM and the State of Michigan. (PA 250a - 439a.)

Pursuant to the contract of administration, BC/BSM determines the medical benefits, procedures, and drugs that are covered. BC/BSM issues a kit to each enrolled member describing the benefits covered which also details the procedure for filing claims. (PA 287a.) Pursuant to the contract of administration, BC/BSM administers a Pharmacy & Therapeutics (P&T) Committee which is "ultimately responsible" for all drugs on the Formulary. (PA 392a.)

The health plan provided by MPSERS has long included provisions for co-payments of drugs and, since 1982, yearly deductibles that are to be paid by the

retirants receiving health benefits under the plan. This case is about Defendant-Appellee Retirement Board's attempt to improperly raise the prescription drug co-payments and health insurance deductibles which the retirants are now required to pay, and the addition of a Formulary Plan implemented on January 1, 2001.

From 1975 to 1981, MPSERS' retirants paid no deductibles for their basic health insurance plan. Starting in 1982 the Retirement Board began requiring that retirants pay deductibles of $50 for single subscribers and $100 for family subscribers to receive their basic health insurance benefits. The deductibles were increased in 1982, 1995, 1997, and 2000 to the point that in the year 2000 retirants were required to pay $165 per year for single subscribers and $330 per year for family subscribers. This represents an increase of 230% from 1982 through the 2001 plan changes.[3]

On January 21, 2000, the Retirement Board decided by a vote of 8-to-3 to implement a new subscription co-payment plan which substantially increased the costs to Plaintiffs-Appellants for their prescription drugs. (PA 66a.) The new program was effective as of April 1, 2000. The operation of the new program demonstrates the significant monetary increases being shifted to Plaintiffs-Appellants. Under the prior retail program,[4] the cost went from $4 for generic to 20% of the drug's approved cost with a $4 minimum and a $20 maximum. For non-generic drugs, the cost went from $8 to 40% of the drug's cost, which translates into no limit to the out-of-pocket costs.

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[3]During the summer of 2004, while Plaintiffs-Appellants' Application for Leave was pending, Defendants-Appellees implemented additional increases in the co-pays and deductibles which further shift the relative burden for the cost of health benefits from the State to the retirees. Now, the retirees must pay $235 per year for single subscribers and $470 per year for family subscribers. (PA 591a - 602a.)

[4]The co-payments under both the old and new programs apply to approved amounts for each drug by the drug plan administrator, BC/BSM.

The increases in the mail-in program were even more onerous for Plaintiffs-Appellants. Under the pre-April 1, 2000 prescription drug plan, retirants had the option of participating in a mail-in program. Under this program, the participants could order a three-month supply of their medication for a single co-payment at a cost of either $4 or $8, depending on whether the drug was generic or non-generic, respectively. Under Defendants-Appellees' new prescription drug plan, retirants are still able to participate in the mail-in program, but the costs have dramatically increased. Under the new program, participants must pay a $10 minimum co-pay up to a maximum of $50. For example, if using the 20% co-pay the retirant's cost is $12 per month, the mail-in participant would pay $36 for a three-month supply, with a $750 cap. Using the same formula, if the retirant's per month cost is $20 for a drug, then the retirant would pay $50, the maximum for a three-month supply. When compared to the $4 and $8 co-pays mail-in participants paid prior to the cost increases implemented by Defendants-Appellees on April 1, 2000, these increases are causing Plaintiffs-Appellants to pay substantially more for the same drugs.

Effective January 1, 2001, a "Formulary Plan" was implemented by the Retirement Board and Defendant-Appellee Department of Management and Budget (hereinafter "DMB") designating specific drugs which the plan would pay for without penalty. Under the "Formulary Plan," Plaintiffs-Appellants will pay 40% of a drug's approved cost for non-formulary drugs, if the non-formulary drug is used without prior approval of the drug plan administrator-BC/BSM. There is no minimum or maximum co-pay amounts for non-formulary drugs. The "Formulary Plan" applies to both retail and mail-in orders.

The gravamen of Plaintiffs-Appellants' Complaint is that the State, through their increases in deductibles and co-pays, has significantly shifted the burden of paying for the retirees' health plan, thus impairing the value of the contract the State made with them. Equally important is what this case is not about. Plaintiffs-Appellants are not arguing that the retirees are exempt from paying any deductibles or co-pays or any increase in deductibles and co-pays. But where, as here, the State's increases in the retirees' deductibles and co-pays substantially shifts the relative burden of paying for the retirees' health benefits, then those increases violate the Constitution's prohibition against impairing the State's contractual obligation to the retirees.

The Trial Court's two Opinions regarding the issuance of the preliminary injunction sought by Plaintiffs-Appellants stated, among other things, that the question of whether Defendant-Appellees had "significantly impaired" the retirants' contractual rights was based on whether Defendants-Appellees' had maintained for the retirants a "reasonable health care package, as they are negotiated and implemented for similarly situated active employees over time." (PA 203a, 246a.) In response to the Trial Court's direction, Plaintiffs-Appellants submitted information regarding the cost of health benefits for active employees' health insurance and compared it to the MPSERS' health plan. That information shows conclusively that Plaintiffs-Appellants' contractual rights to health benefits have been substantially diminished and impaired by Defendants-Appellees' actions complained of in the present action.

Plaintiffs-Appellants filed with the Court of Appeals a timely appeal of the Trial Court's Opinion granting summary disposition. The Court of Appeals' panel

received briefs and heard oral argument on that appeal and rendered an Opinion dated February 3, 2004. That Opinion, found at PA 567a - 577a, is the subject of this appeal.

Plaintiffs-Appellants filed a timely Application for Leave to Appeal on March 15, 2004. In an Order dated September 16, 2004, this Court granted Plaintiffs-Appellants' Application. (PA 603a.) On the same date, this Court granted an Application for Leave to Appeal filed by Defendants herein in Supreme Court Docket No. 125766, in which Defendants are Appellants. (PA 604a.) The Orders in both cases indicated that the case was to be "argued and submitted to the Court together . . . at such future session of the Court as both cases are ready for submission."

Plaintiffs-Appellants will demonstrate that (1) Defendants-Appellees' substantial increases in the deductibles and co-pays violated Plaintiffs-Appellants' rights under art 9, §24 and art 1, §10 of Mich Const 1963, as well as art I, §10 of US Const, (2) that the US Supreme Court, the Michigan Supreme Court, and other courts have rendered numerous applicable and determinative decisions regarding the impairment of contracts under the federal and Michigan Constitutions, which were ignored or misapplied by the Michigan Court of Appeals, and (3) accordingly, the Trial Court and the Court of Appeals erred in not granting Plaintiffs-Appellants' Motion for Summary Disposition or requiring the case to go to trial.

ARGUMENT

I. PREFACE.

In its broadest sense, this case raises the question whether this Court will permit the State of Michigan to shift the relative costs of paying for 140,000 MPSERS retirees' and beneficiaries' (hereinafter collectively referred to as "retirees") health

benefits from the State to those retirees. For many years, the State paid approximately 87% of the costs of those health benefits and the retirees have, through the payment of deductibles and co-pays, paid approximately 13%. However, in 1999, in order to save the State $181 million over a period of four years, the Retirement Board made a broad policy decision to shift the relative burden of paying for those benefits from the State to the retirees. Plaintiffs-Appellants are not contesting the payment of co-pays and deductibles, *per se*. The basic, underlying issue throughout this case is whether the State, acting through the Retirement Board, may significantly shift the relative percent the State has paid in the past to MPSERS retirees.

Further, this is not an action for money damages against the State. It is one for a declaratory judgment and possible injunctive relief which would act prospectively only against the State.

It is important to recognize that a favorable ruling for Plaintiffs-Appellants in this matter will not necessarily have any effect on the payment of health benefits for any other group of State or local government employees. The issues presented herein deal with the contractual rights between the State and school employees. The "contract" which any other group of employees may have with their employing unit is unique to the statutes, ordinances, or other contracts covering the payment for those employees' benefits in retirement. This case involves the rights of approximately 140,000 retirees, but is limited to those persons who retired pursuant to the Retirement Act and not those who have retired under different statutory or other contractual plans.

Plaintiffs-Appellants agree with the Court of Appeals' conclusion at page 10 of its Opinion that Section 91 of the Retirement Act contractually grants to MPSERS

retirees health insurance benefits. (PA 576a.) That Section 91 of the Retirement Act is a contractual commitment of the State of Michigan will be fully briefed and discussed in Plaintiffs' responsive Brief to Defendants-Appellants' main brief in the companion case of the same name, Supreme Court Docket No. 125766, which the Court consolidated for the purposes of argument and submission with the present case. Accordingly, for the purpose of the present Brief, Plaintiffs-Appellants will recognize as valid the proper Court of Appeals' holding that Section 91 of the Retirement Act created an enforceable contract under art I, §10 of US Const and art 1, §10 of Mich Const 1963.

Plaintiffs-Appellants will show (1) that health benefits are "accrued financial benefits" within the meaning of art 9, §24 of Mich Const 1963, (2) that Defendants-Appellees' attempt to shift the relative costs of paying for the health benefits from the State to MPSERS retirees was violative of the retirees' rights under art 9, §24 of Mich Const 1963 and under the general non-impairment clauses of the US and Michigan Constitutions, and (3) that the Trial Court erred as did the Court of Appeals by not granting Plaintiffs-Appellant's Motion for Summary Disposition or, in the alternative, requiring a trial to determine the factual issues presented by the First Amended Complaint.

II. STANDARD OF REVIEW.

A motion brought under MCR 2.116(C)(10) tests the factual basis for a claim. Skinner v Square D Co, 445 Mich 153, 161; 516 NW2d 475 (1994); Babula v Robertson, 212 Mich App 45, 48; 536 NW2d 834 (1995). Summary disposition under MCR 2.116(C)(10) is available when, "except as to the amount of damages, there is no

genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

In reviewing the motion, a trial court must consider the pleadings, affidavits, depositions, admissions, or any other admissible evidence in favor of the non-moving party. MCR 2.116(G)(5); Radtke v Everett, 442 Mich 368, 374; 501 NW2d 155 (1993); Miller v Farm Bureau Mutual Ins Co, 218 Mich App 221, 233; 553 NW2d 371 (1996). Granting the non-moving party the benefit of any reasonable doubt regarding material facts, a trial court must then determine whether a factual dispute exists to warrant a trial. Bertrand v Alan Ford, Inc, 449 Mich 606, 617-618; 537 NW2d 185 (1995); Radtke, *supra*.

A material fact has been defined as an ultimate fact issue upon which a jury's verdict must be based. *See*, Estate of Neal v Friendship Manor Nursing Home, 113 Mich App 759, 763; 318 NW2d 594 (1982). If there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). Under MCR 2.116(C)(10), regarding material facts, courts should be liberal in finding a dispute. Porter v City of Royal Oak, 214 Mich App 478, 484; 542 NW2d 905 (1995).

In deciding the motion, a trial court may not make factual findings or weigh credibility. Barnell v Taubman Co, 203 Mich App 110, 115; 512 NW2d 13 (1993); Manning v City of Hazel Park, 202 Mich App 685, 689; 509 NW2d 874 (1993). If the evidence is conflicting, summary disposition is improper. Barnell, *supra*.

Appellate courts review a motion for summary disposition *de novo* to determine whether the moving party is entitled to judgment as a matter of law. Sewell v

Southfield Public Schools, 456 Mich 670, 674; 576 NW2d 153; 66 ALR 5th 707 (1998); Ruff v Isaac, 226 Mich App 1, 4; 573 NW2d 55 (1997).

III. THE COURT OF APPEALS ERRED BY CONCLUDING THAT HEALTH BENEFITS ARE NOT ACCRUED FINANCIAL BENEFITS WITHIN THE MEANING OF THE FIRST SENTENCE OF ART 9, §24 OF MICH CONST 1963.

Plaintiffs-Appellants base their claim upon two extremely important provisions of Mich Const 1963, *i.e.*, art 9, §24 and art 1, §10, and on art I, §10 of US Const.

Art 9, §24 of Mich Const 1963 provides:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

The Court of Appeals accurately stated that the Supreme Court addressed, but did not definitively decide, whether health benefits are "accrued financial benefits" in Musselman v Governor, 448 Mich 503; 533 NW2d 237 (1995) (hereinafter referred to as Musselman I) and Musselman v Governor, (on rehearing), 450 Mich 574; 545 NW2d 346 (1996) (hereinafter referred to as Musselman II). The Court of Appeals' Opinion quoted extensively from various decisions in Musselman I and II and concluded that it agreed with Justices Riley, Levin, and Weaver. Plaintiffs-Appellants respectfully disagree with the Court of Appeals' Opinion on that issue. The Court of Appeals' reliance on the Riley, Levin, and Weaver Opinions in Musselman I and II is erroneous.

Within the context of the factual and legal issues presented in the present case, health benefits are "financial benefits" within the meaning of art 9, §24 of Mich Const 1963.

A. Musselman I and II are not applicable here.

This Court may rule in favor of Plaintiffs-Appellants without overruling the Musselman case. Although Plaintiffs-Appellants disagree with that opinion, the Musselman case did not involve the central issue herein. The Musselman case was a "funding case." The plaintiffs therein were attempting to restrain the effects of an Executive Order which stopped the actuarial prefunding of health benefits provided for in the Retirement Act. That case, unlike the present case, involved the State's duty to actuarially prefund health benefits pursuant to the second sentence of art 9, §24 of Mich Const 1963, which states:

> Financial benefits arising on account of services rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

In Musselman, the Attorney General acknowledged that the phrase "financial benefits" has a different meaning from the standpoint of "diminishment" or "impairment" in the first sentence of art 9, §24 of Mich Const 1963 than for the purpose of prefunding health benefits found in the second sentence of that provision. Because the Court of Appeals so heavily relied on various decisions issued in Musselman I and II, Plaintiffs-Appellants believe it is important to point out the places in the Musselman briefs where the Attorney General acknowledged the significant difference between the protection of health benefits for the purposes of diminishment or impairment and the State's obligation to prefund benefits under art 9, §24 of Mich Const

1963. At page 34 of their July 29, 1991 Court of Appeals' brief, the Attorney General, in Musselman, stated:

> The Record of the Constitutional Convention does not appear to contain any specific reference to health benefits. While this does not support a conclusion that post-Const 1963 provision of health benefits are not benefits protected from impairment or diminishment, it does suggest that the method of funding such benefits was not considered by the Framers.

PA 48a. (Emphasis added.)

In its September 20, 1991 brief to the Court of Appeals in Musselman, the Attorney General once again reiterated this theme where it stated, at page 4:

> While Executive Order 1991-17 unambiguously changes the funding method for health insurance coverages under 1980 PA 300 for this fiscal year ending September 30, 1991, a covered individual has no less security or coverage than before the Executive Order took effect. The legislative, and constitutional, commitment to deliver the promised benefit when due is both achieved and safe-guarded. Defendants assert that health care benefits continue to be funded on an actuarial basis.

PA 52a. (Emphasis added.)

In every major brief it filed in the Musselman cases, the Attorney General assiduously acknowledged the important distinction between the application of the impairment and diminishment clause from the Legislature's duty to actuarially prefund benefits and asserted that health benefits were protected from diminishment or impairment. The pronouncements of the Attorney General in Musselman are not binding on this Court or the Attorney General herein. They do, however, represent sound reasoning on the part of the Attorney General and acknowledge that the Musselman case was not a diminishment or impairment case, but was a funding case

and that there is a fundamental difference between these two types of cases. It is also relevant to note that the above-cited statements of the Attorney General in Musselman were not necessary to their arguments therein, but were gratuitous statements made to make the State's actions look less onerous. Given the circumstances under which those statements were made, they make the State's arguments in the present case disingenuous to say the least.

B. Art 9, §24 of Mich const 1963 must be interpreted in light of the past problems it attempted to alleviate.

There were two major problems regarding public employee pension plans in Michigan at the time of the Constitutional Convention of 1961-1962. Those two problems, acknowledged on several occasions on the floor of the Constitutional Convention, were (1) the tendency of governmental bodies to take away accrued pension benefits or renege on benefits that had been granted or accrued to employees who had spent years working for public employers under the assumption that they would receive retirement benefits and (2) the failure of public employers, chiefly the State of Michigan, to actuarially prefund pension plans. It was to alleviate these two problems that art 9, §24 was considered necessary in the new Constitution. It was in that context that Constitutional Convention Delegate Richard VanDusen stated on the floor of the Convention:

> Mr. Chairman and members of the committee, this proposal by the committee is designed to do 2 things: first, to give the employees participating in these plans a security which they do not now enjoy, by making the accrued financial benefits of the plans contractual rights. This, you might think, would go without saying, but several judicial determinations have been made to the effect that participants in pension plans for public employees have no vested interest in the benefits which they believe they have earned; that the municipalities

> and the state authorities which provide these plans provide them as a gratuity, and therefore it is within the province of the municipality or the other public employer to terminate the plan at will without regard to the benefits which have been, in the judgment of the employees, earned.
>
> Now, it is the belief of the committee that the benefits of pension plans are in a sense deferred compensation for work performed. And with respect to work performed, it is the opinion of the committee that the public employee should have a contractual right to benefits of the pension plan, which should not be diminished by the employing unit after the service has been performed. Now, this does not mean that a municipality or other public employing unit could not change the benefit structure of its pension plan so far as future employment is concerned. But what it does mean is that once an employee has performed the service in reliance upon the then prescribed level of benefits, the employee has the contractual right to receive those benefits under the terms of the statute or ordinance prescribing the plan. This is the first section. It confers the contractual right. It should confer upon public employees a considerably greater degree of security with respect to the knowledge that they will receive the benefits when the time comes.

Official Record of the 1961 Constitutional Convention of the State of Michigan, at 770-771. (Emphasis added.)

The history of the State of Michigan and its political subdivisions in protecting retirement benefits and in funding them had been abysmal. The State and its municipalities had often arbitrarily deprived employees of their vested retirement benefits for various reasons. As Delegate VanDusen so eloquently stated, it was to end such irrational and arbitrary actions regarding government employees' retirement benefits that the first sentence of art 9, §24 of Mich Const 1963 was needed. It is understandable that the State and its municipalities would desire to have maximum flexibility in dealing with their financial obligations, but the constitutional framers intended that, insofar as vested retirement benefits are concerned, the State may do

nothing to "diminish" or "impair" them. Art 9, §24 of Mich Const 1963 should be reviewed and interpreted in light of the problems it was intended to correct, *i.e.*, giving to public employees "a considerable degree of security" with respect to the retirement benefits which they were told they would receive upon retirement back when they were working. There is nothing in the history leading up to the passage of art 9, §24 of Mich Const 1963 that would lead one to believe that the framers thereof or the voters who approved that provision would want to give retirees any less protection or any less security regarding health benefits than they would regarding their monthly retirement allowance. In fact that history, as Delegate VanDusen stated, compelled them to give employees "a greater sense of security" regarding their retirement benefits than they had previously enjoyed.

C. The Court of Appeals' dichotomy between the terms "benefits" and "accrued financial benefits" is also misplaced.

Justice Riley's Opinion in Musselman I attempted to make a distinction between the term "benefits" used in the initial draft of art 9, §24 by the Finance and Taxation Committee and the phrase "accrued financial benefits" used in the final draft presented on the floor of the Convention. However, a thorough review of the record of the Constitutional Convention discloses no significant differences in the use of the words "accrued financial benefits" from the term "benefits." It should be noted that in Delegate VanDusen's lengthy statement quoted above regarding the first sentence of art 9, §24, he uses those terms interchangeably as did other members of the Committee on Finance and Taxation. In fact, most of the time Delegate VanDusen used the term "benefits" and not "accrued financial benefits." This is entirely understandable because the essence of this new provision being placed in the Constitution was to protect

employees' "deferred compensation" from diminishment or impairment because, as deferred compensation, it was, as Mr. VanDusen stated, entitled to "contractual protection." As Delegate VanDusen stated, this language did not mean an employer could not change retirement benefits for future employment:

> . . . but what it does mean is that once an employee has performed the service in reliance on the prescribed level of benefits, the employee has the contractual right to receive those benefits under the terms of the statute or ordinance prescribing them. This is the first section. It confers the contractual right.

See p 771 of the Official Record of the Michigan Constitutional Convention of 1961. (Emphasis added.)

The essence of Mr. VanDusen's comments was in no way connected to some perceived difference between the terms "benefits" and "accrued financial benefits," but upon the contractual nature of "deferred compensation." This theme was also recited numerous times by other members of the Committee on Finance and Taxation which drafted the language of art 9, §24. Delegate VanDusen's statement at p 771 did not end his explanation. Later in the same session, Delegate Iverson asked Mr. VanDusen the following question:

> Mr. Iverson: So that the present language was intended then to protect the accrual of benefits to the time that any municipality might dispense with a pension plan?

See p 773 of the Official Record of the Michigan Constitution Convention of 1961.

Delegate VanDusen's immediate answer was:

> That is correct. This was simply designed to put pension benefits earned in public service on the same basis as deferred compensation earned in private employment. It is a contractual right.

Id.

Delegate Donnmi Binkowski, another attorney member of the Committee on Finance and Taxation, which drafted art 9, §24, chimed in:

> One of the reasons that has been expressed for making the accrued benefits contractual is the fact that the supreme court decisions have ruled that the pension or retirement systems are a gratuity. And this has been held true today in spite of the fact that we have our concept of deferred compensation. . . . And there is no question that when an employee today takes employment with a governmental unit, he does so with the idea that there is a pension plan or retirement system involved. And, in order to protect them, we believe that the first paragraph is necessary.

Id. (Emphasis added.)

Here, we see another member of the Committee on Finance and Taxation explaining that the essence of the first paragraph of art 9, §24 of Mich Const 1963 was to give constitutional, contractual protection to the benefits from a pension plan or retirement system because they were "deferred compensation." The tenor of all the comments by the scriveners of this constitutional language was, therefore, not based on some ill-conceived dichotomy between the terms "benefits" and "accrued financial benefits," but upon protecting those benefits from governmental tyranny.

Many courts, in a myriad of circumstances, have viewed health benefits as part of "pension benefits" or "retirement benefits" and as "deferred compensation."

For example, in McMinn v City of Oklahoma City, *et al*, 1997 OK 154; 952 P2d 517 (1997), the Supreme Court of Oklahoma, when holding that several public employers were liable for the plaintiff-employees' "retirement benefits," stated:

> Retirement benefits include pensions, but can also include much more, such as insurance coverage and profit sharing.

Id at 521.

In Weiner v County of Essex, 262 NJ Super 270; 620 A2d 1071 (1992), a New Jersey Superior Court, in finding that a municipality was required to pay post-retirement medical benefits to plaintiff retirees, stated:

> In Gauer v Essex County Division of Welfare, *supra*, the Supreme Court was ". . . persuaded that the reimbursement of health insurance premiums to long-standing employees was intended at least in part as compensation for extended tenure" and that ". . . these retirement benefits were sufficiently compensatory to afford the plaintiff some interest in their preservation." *Id*, 108 NJ at 150, 528 A2d 1.

Id at 1079. (Emphasis added.)

In Thoring v Hollister School Dist, 11 Cal App 4th 1598; 15 Cal Rptr 2d 91 (1992), the California Court of Appeals, in holding that retiree health benefits were protected from suspension by the school district, stated:

> While the policy authorizing the board to continue postretirement health and welfare benefits for long-term board members was not in effect when appellants were elected to office in 1985, the policy was adopted during that term. "An employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure." Betts v Bd Administration, *supra*, 21 Cal 3d at p 866.
>
> * * *
>
> "[I]n determining whether they are fundamental the court is to evaluate 'the effect of it in human terms and the importance of it to the individual in the life situation.' [Citation.]" California League, *supra*, 89 Cal App 3d at pp 139-140. The court found it significant that the three benefits were included in the district's official declaration of policy pertaining to employment, that they "were important to the employees, had been an inducement to remain employed with the district, and were a form of compensation which had been earned by remaining in employment." (at p 140.)

> The benefits involved in the instant case share these qualities.

Id at 1605-1606. (Emphasis added.)

The benefits being discussed were post-retirement health benefits. For additional cases in which post-retirement health benefits have been referred to as "deferred compensation," *see*, Hinkley, *et al* v Kelsey-Hayes Co, 866 F Supp 1034 (ED Mich, 1994); Upshur Coals Corp v United Mine Workers of America, *et al*, 933 F2d 225 (CA 4, 1991); and Booth v Sims, 193 W Va 323; 456 SE2d 167 (1994).

D. The Executive Branch of Michigan's government promised the members of MPSERS and the retirees therefrom that their health benefits were secure under the Michigan Constitution.

In 1992, the State changed the actuarial funding of health benefits for MPSERS' retirants from actuarial prefunding to a "pay as you go" system. This caused great consternation with MPSERS' members and retirants regarding the State's ability to provide their health benefits in the future. To allay those fears, both Governor Engler and State Treasurer Douglas B. Roberts, sent letters to every MPSERS member and retirant. Governor Engler's letter, dated March 24, 1993, explained the change in funding source. (PA 89a.) He concluded that letter as follows:

> This change was merely a change in funding source and will have no impact on any of your benefits, this year or in the future. In fact, a similar adjustment was made last year as a result of legislative approval of SB 213.
>
> To conclude, School retirees will receive their benefits in full. (Emphasis added.)

State Treasurer Roberts' letter of October 20, 1994, (PA 90a) further attempted to allay any fears MPSERS members or retirants may have had by stating, *inter alia*:

> The State of Michigan administers a very comprehensive package of retirement benefits for public school retirees, including health, dental and vision coverages. Out of pocket insurance costs for retirees are minimal compared to most other public employee retirement systems.
>
> Benefits under your retiree health insurance plans have been and will continue to be paid in full each year. This is how health care for State of Michigan retirees and for the vast majority of public sector retirees nationwide has always been paid. The fact that the MPSERS health plan has not been "prefunded" since 1991 does not change this commitment. Health care for State of Michigan retirees has never been "prefunded" and their benefits have never been cut or restricted because of this. Your retiree health benefits are not in jeopardy in any way.
>
> Your basic pension benefits are protected under the Michigan Constitution. (Emphasis added.)

If any MPSERS member or retiree had any question about the contractual commitment of the State of Michigan to provide them with their health benefits prior thereto, the two above-cited letters from the State's Governor and Treasurer clarify once and for all the State's commitment and assurance to those people that their pension benefits, including health benefits, were contractually protected under the Michigan Constitution. These statements demonstrate that the Executive Branch agreed with Delegate VanDusen's statements about art 9, §24 at the Constitutional Convention of 1961 and that the Executive Branch viewed health benefits as accrued financial benefits within the meaning of the first sentence of that provision.

Given these Executive Branch commitments to all Michigan public school employees, it is unfair, unwise, and unconstitutional to assume that the Retirement Board can now impair or diminish their health benefits.

E. **The term "financial" means more than "money" or "hard currency" that can be "spent."**

The Court of Appeals' Opinion erroneously equated "financial benefits" with "money" or "hard currency" that can be "spent." Justice Riley's decision in Musselman I was quoted at length regarding that issue at pp 6-7 of the Court of Appeals' Opinion. (PA 572a - 573a.) However, a thorough analysis of the word "financial" discloses that such a narrow interpretation of that term is unwarranted in the present case. On that question, Justice Riley's Opinion in Musselman I cited *The National Mortgage News* about a proposed rule by the Financial Accounting Standards Board (FASB) that would require "financial institutions" to report the value of all "financial instruments" in their portfolios. The proposed rule excluded from the term "financial instruments" such items as pension benefits, leases, insurance policies, and similar items. Justice Riley's opinion then concluded that:

> . . . if the FASB does not consider pension benefits and insurance policies to fall under the definition of a financial instrument, it is not a large leap to conclude that health insurance benefits included in a pension plan are not a financial instrument and hence are not a financial benefit.

Musselman, 448 Mich at 527.

This analysis, as applied to the facts and circumstances of the present case, is flawed for the following reasons:

1. The Musselman case dealt with the funding requirements under the second sentence of art 9, §24 of Mich Const 1963. The present case is a diminishment and impairment case under the first sentence of art 9, §24.

2. The use of the word "financial" in various situations is highly contextual. Because pension benefits are not "financial benefits" for the purpose of

certain FASB requirements for financial institutions does not mean that pension benefits are not "financial benefits" for the purpose of art 9, §24. Pension benefits are clearly "financial benefits" for the purpose of art 9, §24. (Justice Weaver acknowledged the same at pp 578-583 of her Opinion in Musselman II.) In determining what the word "financial" means in any particular case, courts must look at the peculiar facts and circumstances surrounding the use of that term or the context in which it is used. Given the facts and circumstances surrounding the use of the term "financial" in art 9, §24 of Mich Const 1963 and the abuses that the drafters of the constitutional provisions were attempting to alleviate, it is logical that "financial," at least as used in the first sentence of that article, was intended to have a broader meaning than the very limited context of reporting requirements for financial institutions under a FASB rule. In short, the context in which the term "financial" is used is extremely important and is determinative of the present case.

3. Justice Riley's reference to the meaning of the term "financial" in a proposed FASB rule is further misplaced because FASB Rules or Statements do not apply to governmental institutions such as the State of Michigan and its political subdivisions. They are instead subject to the accounting standards of the Governmental Accounting Standards Board (hereinafter "GASB"). In that regard, the recently-adopted "Statement No. 45" of GASB is entirely relevant here. Pursuant to the new Statement No. 45, governmental bodies throughout the United States, including the State of Michigan and all of its political subdivisions, are required to treat post-retirement health benefits the same as pension benefits for the purpose of their financial reporting. Paragraph 1 of the Introduction to Statement No. 45 states:

> The objective of this Statement is to improve the faithfulness of representations and usefulness of information included in the financial reports of state and local governmental employers regarding **other postemployment benefits** (OPEB). *OPEB* refers to **postemployment** benefits other than **pension benefits** and includes (a) **postemployment healthcare benefits** and (b) other types of postemployment benefits (for example, life insurance) if provided separately from a pension plan. Like pensions, OPEB arises from an exchange of salaries and benefits for employee services rendered and constitutes part of the compensation for those services.

PA 579a. (Bolding in original; emphasis added; footnote omitted.)

In the Section entitled Standards of Governmental Accounting and Financial Reporting, Scope and Applicability of this Statement, paragraph 5, the GASB states:

> The requirements of this Statement address employer reporting for participation in **defined benefit OPEB plans** and in **defined contribution plans** that provide postemployment benefits other than pensions. Defined benefit OPEB plans are plans having terms that specify the *benefits* to be provided at or after separation from employment. The benefits may be specified in dollars (for example, a flat dollar payment or an amount based on one or more factors such as age, years of service, and compensation), or as a type or level of coverage (for example, prescription drugs or a percentage of healthcare insurance premiums).

PA 580a. (Bolding and italics in original; emphasis added.)

When discussing its "Approach" to Statement No. 45, GASB stated at paragraph 64, p 73:

> In reaching its decision, the Board considered whether OPEB is significantly different from pension benefits in ways that would support a different approach to measuring or reporting them. For example, pension benefits are generally paid in cash, and the payments are similar in amount each period and continue throughout the retirement period.

> In contrast, OPEB (for example, postemployment healthcare benefits) often is provided "in kind" as needed, may increase in amount as a retiree ages, or may decrease or terminate when a retiree becomes eligible for Medicare. The two types of benefits also frequently differ in provisions regarding the vesting of benefits and the amendment of plan terms. The Board concluded that these differences tend to make OPEB information more difficult to measure and more volatile than pension information because of the need for more assumptions about future events. However, the greater complexity of measurement does not alter the conclusion that OPEB and pension benefits are conceptually similar transactions—both involve deferred compensation offered in exchange for current services—and should be accounted for in a similar way.

PA 587a.[5] (Emphasis added.)

At pp 77-78 of Statement No. 45, GASB, in the Section entitled Comments on Accounting Issues at paragraph 75 states, *inter alia*:

> The Board considered but did not accept the argument that if OPEB is not vested or guaranteed, or requires periodic authorization by the employer, it should not be accounted for as a long-term commitment. Rather, the Board affirmed its conclusion that postemployment benefit transactions are an *exchange of promised benefits for employee services*. The total compensation to employees in exchange for their services includes *both* (a) benefits such as salaries and active-employee healthcare, which are taken in the period(s) of employee service, *and* (b) other benefits (for example, pensions and postemployment healthcare), which are deferred and are not taken until after retirement or another future event, such as disability, occurs.

PA 588a - 589a. (Italics in original; emphasis added.)

When Plaintiffs-Appellants filed their Application for Leave to Appeal herein, GASB Rule 45, which is properly called "Statement No. 45," was a proposed

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[5]Once again, we refer the Court to Delegate VanDusen's nearly identical statement when explaining the need for the first paragraph of art 9, §24 on the floor of the Constitutional Convention.

rule. Since Plaintiffs-Appellants filed their Application, GASB has fully and formally adopted Statement 45, including all the comments regarding that Statement which are quoted above. What Statement 45, once and for all, finally nails down is that post-employment benefits such as health care are most assuredly accrued financial benefits because they are, as Richard VanDusen stated in 1961, "deferred compensation" paid to employees after retirement.

4. The fact that health benefits were not provided by MPSERS to its retirants in 1961 when the Constitution was drafted, or when voted upon by the people in 1963, does not infer that the drafters or the voters who passed it intended that health benefits were not "financial benefits." Such a limited construction of that phrase is contrary to common sense and to years of state and federal constitutional history. For example, the US Constitution does not expressly provide for a federal banking system. However, the US Supreme Court in McCulloch v Maryland, 17 US 316; 4 L Ed 579 (1819), used an expansive interpretation of the federal constitution's "necessary and proper" clause to permit Congress to provide for a federal banking system. Given the clear statements of the drafters of art 9, §24 on the floor of the Constitutional Convention and what GASB now requires of all state and local governments in the United States regarding how post-employment health benefits must be treated on their financial statements, it is ludicrous to assume that health benefits are not "financial benefits" within the meaning of art 9, §24 of Mich Const 1963.

A similar argument was made by the State of Alaska in the recently decided case of Duncan v Retired Public Employees of Alaska, Inc, 71 P3d 882 (Alaska, 2003). Therein, various state retirees claimed that changes the state of Alaska

made to their health benefits program violated art XII, §7 of the Alaska Constitution which is Alaska's counterpart to art 9, §24 of Mich Const 1963. Art XII, §7 provides:

> Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship . Accrued benefits of these systems shall not be diminished or impaired.

The state in Duncan argued, *inter alia*, that since health benefits were not provided to retirees at the time Alaska's Constitution was drafted and ratified, they were not meant to be included within the term "accrued benefits." Rejecting the state's argument, the Alaska Supreme Court stated:

> Nothing in the text of art XII, section 7, nor in the history of the Constitutional Convention, suggests the founders intended to limit "accrued benefits" to the particular types of benefit being provided by territorial retirement systems at the time of the ratification of the constitution.
>
> * * *
>
> We conclude that the term "accrued benefits" is not limited to just the benefits that were provided to public employees at the time of ratification of the constitution. Instead, the term includes all retirement benefits that make up the retirement benefit package that becomes part of the contract of employment when the public employee is hired, including health insurance benefits.

Id at 887-888.

The argument for including health benefits as part of "accrued financial benefits" under art 9, §24 of Mich Const 1963, is even stronger than it was in Duncan. As noted earlier herein, Constitutional Convention Delegate VanDusen and other members of the Committee on Finance and Taxation, who drafted that article, most clearly expressed their intent to contractually protect from impairment or diminishment benefits that were considered to be "deferred compensation."

Why would the drafters of art 9, §24 of Mich Const 1963, or the voters who ultimately approved it, have desired to give public employees a "greater sense of security" regarding their monthly retirement allowance, as Delegate VanDusen stated, but have applied a lesser standard to their health benefits? The effect on the retirees is identical. In fact, for many retirees, their health benefits are every bit, if not more, important to their well-being than their monthly retirement allowance. Further, it is illogical to assume that the drafters of art 9, §24 or the citizens who voted thereon were saying to the Legislature: "Don't saddle succeeding generations with billions of dollars of liability for future retirement allowances, but it's perfectly proper to saddle them with billions of dollars in expenses for health benefits."

For the reasons stated above, Plaintiffs-Appellants ask this Court to adopt an interpretation of the word "financial benefits" as used in art 9, §24 of Mich Const 1963 which is in accord with the common everyday meaning found in *Webster's Ninth New Collegiate Dictionary*, p 463, which defines the word "financial" as "relating to finance." The term "finance" is defined as:

> **1** *pl*: money or other liquid resources of a government, business, group or individual **2**: the system that includes the circulation of money, the granting of credit, the making of investments, and the provision of banking facilities **3**: the science or study of the management of funds **4**: the obtaining of funds or capital.

Id.

Admittedly, "financial" connotes cash and hard currency. However, within the context of the history behind the passage of art 9, §24, the dictionary definition of that word, GASB rules, and common sense, that term must include health care benefits as it is used in the first sentence of art 9, § 24.

On the basis of the above arguments, we ask this Court to reverse the Court of Appeals' decision on that issue and hold that the post-retirement health benefits provided to MPSERS members under Section 91 of the Retirement Act are accrued financial benefits subject to art 9, §24 protection from diminishment or impairment.

IV. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT MPSERS RETIREES' HEALTH BENEFITS ARE PROTECTED FROM DIMINISHMENT OR IMPAIRMENT PURSUANT TO ART I, §10 OF US CONST AND ART 1, §10 OF MICH CONST 1963.

Art I, §10 of US Const states, *inter alia*:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts.

Art 1, §10 of Mich Const 1963 uses almost identical language where it states:

> No . . . law impairing the obligation of contract shall be enacted.

The Court of Appeals' Opinion correctly acknowledged that the non-impairment clause in both the federal and state constitutions prohibit the State from exacting laws that impair the obligation of contract. It also correctly acknowledged that:

> The purpose of the Contract Clause is to protect bargains reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements.

PA 575a.

This Court recognized in Campbell v Judges' Retirement Bd, 378 Mich 169; 143 NW2d 755 (1966), the applicability of art I, §10 of US Const to the statutory grant of pension benefits to Michigan circuit judges under legislative statutes. This Court stated:

> Michigan Constitution of 1908, art 2, §9, followed by Michigan Constitution of 1963, art 1, §10, and article I, §10 of the United States Constitution, prohibit the impairment by State law of the obligation of a contract. Vested rights acquired under contract may not be destroyed by subsequent State legislation or even by an amendment to the State Constitution. (Citations omitted.)
>
> In this case plaintiffs, who had been judges and contributing members of the judges' retirement system, elected to and did retire under the governing act. Under that act and particularly section 12 thereof, they, thereupon, ceased to be members of the system. When they so retired and ceased to be members of the system, their contract was completely executed and their rights thereunder became vested. These could not, thereafter, be diminished or impaired by legislative change of the judges' retirement statute. (Citations omitted.)
>
> * * *
>
> We hold that a valid contract was entered into between judges and the State, that the State's agreement thereunder to pay the judges certain benefits created vested rights for the judges upon their retirement, that these are enforceable and cannot be impaired or diminished by the State. This should be deemed to include not only the benefits provided by statute at the time of entry into the contract and of retirement, but, also, those later added by statutory amendment. The legislature may add to but not diminish benefits without running afoul of constitutional prohibition against impairment of the obligation of a contract. (Emphasis added.)

Id at 180-181.

Campbell, *supra*, is one of numerous cases in which courts in Michigan have relied upon the US Supreme Court's interpretation of this State's obligations under art I, §10 of US Const. For example, the Court of Appeals in Michigan Transportation Co v Secretary of State, 41 Mich App 654; 201 NW2d 83 (1972), relied on the US Supreme Court's decisions in Home Building and Loan Ass'n v Blaisdell, 290 US

398; 54 S Ct 231; 78 L Ed 413 (1934) and City of El Paso v Simmons, 379 US 497; 85 S Ct 577; 13 L Ed 2d 446 (1965) *reh den* 380 US 926; 85 S Ct 879; 13 L Ed 2d 813 (1965), in determining whether a legislature's impairment of a contract violated art 1, §10 of Mich Const 1963.

In 1973, the Michigan Court of Appeals, in Washtenaw Community College Ed Ass'n v Board of Trustees of the Washtenaw Community College, 50 Mich App 467; 213 NW2d 567 (1973), relied on City of El Paso, *supra*, in concluding that the college's refusal to abide by a retirement provision in a collective agreement which was contrary to a subsequently-enacted law requiring the college to contribute only to MPSERS on behalf of its employees, violated those employees' rights under both the federal and Michigan non-impairment clauses.

In 1976, after the Michigan Court of Appeals' decisions in Washtenaw Ed Ass'n, *supra*, and Michigan Transportation Co, *supra*, the US Supreme Court rendered its decision in United States Trust Co of New York, Trustee v New Jersey, 431 US 1; 97 S Ct 1505; 52 L Ed 2d 92 (1977) *reh den* 431 US 975; 97 S Ct 2942 (1977), which Plaintiffs-Appellants believe is determinative of the issues raised herein. The facts in US Trust Co, *supra*, are significant because they demonstrate a situation which that Court believed was significantly different on its facts from those in Blaisdell, *supra* and City of El Paso, *supra*. The Supreme Court in US Trust Co found a significant impairment because that case, like the present case, involved an impairment of a financial obligation of a state to private citizens.

In US Trust Co, *supra*, the states of New York and New Jersey enacted statutory covenants in 1962 which limited the Joint Port Authority of New York and

New Jersey from subsidizing rail passenger transportation from certain reserves pledged as security for consolidated bonds issued by the Port Authority. In 1974, in response to what both states perceived as a crisis involving mass transportation, energy conservation, and environmental protection, the legislatures of both New Jersey and New York repealed their 1962 statutory covenants. The United States Trust Company, as trustee for and as holder of certain port authority bonds, brought a declaratory judgment action in the New Jersey Superior Court alleging that the New Jersey legislature's repeal of the statutory covenant was a violation of bond holders' rights under the non-impairment of contracts clauses of the US Constitution.[6]

The Superior Court of New Jersey, after first holding that the repeal of the covenant in fact represented an impairment of the contractual obligation of the states to the bond holders, dismissed the complaint holding, among other things, that the impairment was permissible under Blaisdell, *supra* and City of El Paso, *supra*. On similar grounds, the Supreme Court of New Jersey upheld the trial court's decision to dismiss.

On direct appeal, the US Supreme Court reversed the decisions of the Superior Court and the New Jersey Supreme Court and held that the repeal of the 1962 statutory covenant violated art I, §10 of US Const. Because the Court's reasoning for its reversal of the New Jersey courts is so relevant to the issues in the present case, and because the decision in US Trust Co, *supra*, amounted to a significant change in the way courts viewed a state's impairment of certain contractual obligations, substantial analysis of that decision is necessary.

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[6]A similar action was brought in New York State courts, but was held in abeyance pending the outcome of the New Jersey suit.

One of the chief arguments of the State of New Jersey was that under Blaisdell, *supra* and City of El Paso, *supra*, a state has great latitude to impair contractual obligations under the Tenth Amendment to the US Constitution, often referred to as the "reserved powers clause." US Const amend X states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Court extensively analyzed a state's rights under the "reserved powers clause," and that clause's applicability to the facts of that case. In the course of its analysis, the Supreme Court stated, *inter alia*:

> A State could not "adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption . . . .
>
> When a State impairs the obligation of its own contract, the reserved-powers doctrine has a different basis. The initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future.

431 US at 22-23. (Emphasis added; citations omitted.)

The Supreme Court acknowledged it was long-established law that a state cannot contract away or surrender the essential attributes of its sovereignty. But, as to financial obligations of a state to citizens, the Court said:

> Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned. Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. Similarly, the taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the Court

> has regularly held that the States are bound by their debt contracts.[22]

Id at 24. (Emphasis added.)

Footnote 22 referred to above states, *inter alia*:

> State laws authorizing the impairment of municipal bond contracts have been held unconstitutional . . . .
>
> A number of cases have held that a State may not authorize a municipality to borrow money and then restrict its taxing power so that the debt cannot be repaid.

Id. (Citations omitted.)

The Court then stated:

> The instant case involves a financial obligation and thus as a threshold matter may not be said automatically to fall within the reserved powers that cannot be contracted away.[23]

Id at 24-25. (Emphasis added.)

Footnote 23 states, *inter alia*:

> "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." Murray v Charleston, 96 US at 445.

Id at 25. (Emphasis added.)

The Court then entered into the next phase of the non-impairment analysis and discussed situations in which the state may modify its own contractual obligations. The Court went on to state:

> As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.[25]

Id at 25-26. (Emphasis added.)

Footnote 25 states, *inter alia*:

> . . . . see also Lynch v United States, 292 US 571, 580 (1934) (need for money is no excuse for repudiating contractual obligations); Note, The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause 125 U Pa L Rev 167, 188-191 (1976).

Id at 26.

The Court then applied the "reasonable and necessary test" to the facts of that case. The Court acknowledged "mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern." *Id* at 28. It also recognized the State of New Jersey had contended that these goals were so important that any harm to bond holders from repeal of the 1962 covenant was greatly outweighed by the public benefit. To those arguments, the Court stated:

> We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss. Contrary to Mr. Justice Black's fear, expressed in sole dissent in El Paso v Simmons, 379 US, at 517, the Court has not "balanced away" the limitation on state action imposed by the Contract Clause. Thus a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private

> welfare of its creditors. We can only sustain the repeal of the 1962 covenant if that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State.
>
> The more specific justification offered for the repeal of the 1962 covenant was the State's plan for encouraging users of private automobiles to shift to public transportation. The States intended to discourage private automobile use by raising bridge and tunnel tolls and to use the extra revenue from those tolls to subsidize improved commuter railroad service. Appellees contend that repeal of the 1962 covenant was necessary to implement this plan because the new mass transit facilities could not possibly be self-supporting and the covenant's "permitted deficits" level had already been exceeded. We reject this justification because the repeal was neither necessary to achievement of the plan nor reasonable in light of the circumstances.

Id at 29. (Emphasis added; footnote omitted.)

The Court stated that the concept of "necessity" can be considered on two levels. First, it could not be said that the total repeal of the 1962 covenant was essential; a less drastic modification would have permitted the contemplated plan without entirely removing the covenant's limitations on the part of port authority revenues and reserves to subsidize commuter railroads. *Id* at 29-30. Second, the Court pointed out that ". . . without modifying the covenant at all, the States could have adopted alternative means of achieving their twin goals of discouraging automobile use and improving mass transit." *Id* at 30. To the states' contention that choosing among various alternatives was a matter of legislative discretion, the Supreme Court said:

> But a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.

Id at 30-31.

The Court then concluded:

> In the instant case the State has failed to demonstrate that repeal of the 1962 covenant was similarly necessary.

Id at 31.

The Court then discussed the question of reasonableness. In that regard, the Court stated:

> We also cannot conclude that repeal of the covenant was reasonable in light of the surrounding circumstances. In this regard a comparison with El Paso v Simmons, *supra*, again is instructive.

Id.

The Court then distinguished the facts in City of El Paso, *supra*, from those in US Trust Co, *supra*, and concluded its analysis of the reasonableness of the impairment in question:

> By contrast, in the instant case, the need for mass transportation in the New York metropolitan area was not a new development, and the likelihood that publicly owned commuter railroads would produce substantial deficits was well known. . . .
>
> During the 12-year period between adoption of the covenant and its repeal, public perception of the importance of mass transit undoubtedly grew because of increased general concern with environmental protection and energy conservation. But these concerns were not unknown in 1962, and the subsequent changes were of degree and not of kind. We cannot say that these changes caused the covenant to have a substantially different impact in 1974 than when it was adopted in 1962. And we cannot conclude that the repeal was reasonable in light of changed circumstances.

Id at 31-32. (Emphasis added.)

With that, the Supreme Court concluded its Opinion by stating:

> We therefore hold that the Contract Clause of the United States Constitution prohibits the retroactive repeal of the 1962 covenant. The judgment of the Supreme Court of New Jersey is reversed.

Id at 32.

The decision of the US Supreme Court in US Trust Co, *supra*, has been followed by numerous state and federal courts in holding that various impairments of contract rights, particularly those in the retirement area, are violative of the non-impairment clause of the US Const. In this regard, see Oregon State Police Officers Ass'n v State of Oregon, 323 Ore 356; 918 P2d 765 (1996), Valdes v Cory, 139 Cal App 3d 773; 189 Cal Rptr 212 (1983), and State of Nevada Employees Assn v Keating, 903 F2d 1223 (CA 9, 1990) *cert den* 498 US 999; 111 S Ct 558 (1990).

The teachings of US Trust Co, *supra*, may be summarized as follows: When analyzing an alleged impairment of contracts situation, a court must:

1. Find that the state has entered into a contractual relationship. The question as to whether, in the context of the present case, MCL 38.1391(1) is a contractual obligation that cannot be diminished or impaired by the State will be fully briefed in Plaintiffs' responsive Brief in the companion case Studier, *et al* v MPSERS, *et al*, Supreme Court Case No. 125766, which will be consolidated for the purpose of oral argument and decision with this case.

2. Find that there was a substantial impairment of the contractual right entered into between the State and an individual. It was at this stage of the analysis that both the Trial Court and the Court of Appeals made a grievous error by holding that there was not a substantial impairment of the retirees' contractual rights. We will show why the Trial Court and Court of Appeals erred in making that conclusion subsequently in this Brief.

3. Where the vested contractual right involves the financial obligation of the State, the courts will carefully scrutinize the impairment because the State's own financial interests are at stake.

4. Even where the State's financial interests are at stake, the State, in rare cases, may be permitted to impair its contractual obligation where the State can demonstrate that the impairment was both reasonable and necessary to serve an important public purpose. Herein, neither the Trial Court nor the Court of Appeals had to make such a determination because they found there was not a substantial impairment of Plaintiffs-Appellants' contractual interests. This burden of the State most certainly was not met in the affidavits supplied by Defendants-Appellees. Further, that type of critical analysis should only be made upon a strong factual showing by the State of both reasonableness and necessity. Herein, the record is devoid of such a showing. We have only the self-serving statements of the Attorney General.

5. In applying the reasonable and necessary test, complete deference to a legislative assessment of reasonableness and necessity is not appropriate where the State's economic self-interest is at stake.

6. In looking at the question of necessity, the State must show a less drastic modification would not have solved its legitimate problem or that there would be no other alternative means of achieving the State's goals. Once again, Defendants-Appellees did not even attempt to make such a showing herein.

The balance of this Brief is dedicated to showing that the affidavits presented by Plaintiffs-Appellants clearly demonstrate that the State's increases in the deductibles and co-pays, which must now be paid by MPSERS retirees, amounts to a substantial shift of the costs for their health benefits from the State to the retirees. Further, if there is any doubt in the Court's mind as to that showing, based on the affidavits of the parties, this case should proceed to trial.

V. THE TRIAL COURT AND THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT MPSERS' INCREASES IN THE DEDUCTIBLES AND CO-PAYS TO THE RETIREES AMOUNTED TO A SUBSTANTIAL IMPAIRMENT OF THE STATE'S CONTRACTUAL OBLIGATION TO THE RETIREES.

Assuming a valid contractual obligation exists, the next prong of the analysis is to determine whether the State's action constitutes a "significant impairment"

of that obligation. Both the Trial Court and the Court of Appeals erroneously determined that Defendants-Appellees had not significantly diminished or impaired the State's contractual obligation to provide MPSERS retirees with the health benefits to which they are entitled under Section 91 of the Retirement Act.

The US Supreme Court "has provided little specific guidance as to what constitutes a 'substantial' contract impairment." State Library v Freedom of Information Comm'n, *et al*, 717 A2d 842, 849; 50 Conn App 491 (1998), citing Baltimore Teachers Union v Mayor of Baltimore, 6 F3d 1012, 1017 (CA 4, 1993). "It appears that the Supreme Court has assumed 'that an impairment is substantial at least where the right abridged was one that induced the parties to contract in the first place.'" *Id.* However, "total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Id.*

In Transport Workers Union of America, Local 290 v Southeastern Pennsylvania Transportation Authority, *et al*, 145 F3d 619 (CA 3, 1998), the US Court of Appeals for the Third Circuit summarized the analysis required here as follows:

> Contracts enable individuals [and public entities] to order their . . . affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them. The purpose of the Contract Clause is to protect the legitimate expectations that arise from such contractual relationships from unreasonable legislative interference. Thus, we must determine whether there has been a substantial impairment of the contractual relationship by inquiring whether legitimate expectations of the plaintiffs have been substantially thwarted.

145 F3d at 622. (Internal quotations and citations omitted.)

The legitimate expectations of Plaintiffs-Appellants in this case include the continuation of health insurance benefits without the burden of paying for such benefits being shifted to their shoulders.

Defendants-Appellees will argue that the contractual obligation is to pay the "entire monthly premium" for such benefits and that is exactly what is being done. Both the Trial Court and the Court of Appeals bought into this argument. The mistake made by both lower courts is the failure to recognize the direct correlation between premiums and co-pays and deductibles. For example, if one were to increase the deductibles paid for his/her car insurance, there would be a corresponding deduction in the amount of premiums owed.

The same is true in this case. While it may be that Defendants-Appellees are paying the "entire monthly premium," that premium is lower due to the fact that Plaintiffs-Appellants are now shouldering a bigger burden in terms of higher co-pays and deductibles. This shifting of the burden is the essence of this litigation and is critical to the determination of an impairment of the contractual relationship.

The Trial Court in this matter came closest to understanding this correlation when it stated in Opinion I that under art 1, §10, Defendants "cannot unilaterally terminate these vested benefits, either all at once or by nibbling them to death, a piece at a time." (PA 197a.) This is exactly what is being done here. Through the periodic increases to co-pays and deductibles implemented over the years outlined above, Defendants-Appellees are substantially impairing their contractual obligation to Plaintiffs-Appellants.

Both parties to this action employed experts to review and opine whether the State had substantially impaired its contractual obligations. Plaintiffs-Appellants retained three highly-respected actuaries, each of whom submitted several affidavits. Those affidavits contain conclusions which would allow a reasonable person to conclude that there has been a substantial impairment in this case. A representative sampling of Plaintiffs-Appellants' experts' conclusions include the following:

- "The increase in medical expenses for retirees has gone up at a higher rate than for MPSERS. Considering plan data from 1995 thru 1999 plus estimates of the impact of the 2000 and 2001 plan changes, the increase in retiree costs is estimated at 116.8% while the increase over the same period for MPSERS is 33.3%." (PA 467a - 541a.)

- "The one year (1999 to 2000) increase to retirees is 36.1% and the increase to MPSERS is 8.2%." (*Id.*)

- "I determined from the above that 99.9% of the active employees have deductibles lower than the MPSERS plan." (PA 440a - 449a.)

- "I determined from the above that 99.9% of the active employees have drug co-pays lower than the MPSERS plan." (*Id.*)

- "I determined from the above that 95.2% of the active employees have benefit plans less restrictive than the MPSERS plan on this continuum." (*Id.*)

- "Based on the data made available by the Defendants, I estimate that from 1998 to 2001, MPSERS' changes to the health insurance plan increased the patient cost-sharing per eligible beneficiary for prescriptions alone by 55% compared to what would have occurred had no changes been made to the plan, without counting the loss of access to prescription medicines not covered by the formulary imposed by MPSERS or loss of services that beneficiaries do not use as a result of the higher patient payments for services. Over the same period -- MPSERS' imposed changes to the health insurance plan increased patient cost-sharing per eligible beneficiary for all benefits provided by the health insurance plan by 33% compared to what would have occurred if the health insurance plan had not been changed. Both the size of the increases and their persistency over time make these increases

significant, and evidence of a policy of shifting costs to retirees to reduce the cost to the MPSERS." (PA 224a - 227a; emphasis in original.)

- "Based on the data made available by Defendants, I estimate that if the effect of the formulary and utilization changes are included, the MPSERS changes to the health insurance plan increased patients' costs per beneficiary by 2.54 times (a 154% increase) for prescriptions alone, and by 84% for all health insurance benefits compared to what would have occurred had no changes been made to the plan." (*Id.*)

- "Participant payments (for deductibles and co-pays) increased 41.3% while the plan payments increased only 22.5%." (PA 205a - 219a.)

- "Additionally, prescription drug co-payments paid by the payments in 2000 were substantially higher than historically. Exhibit A attached compares the data contained in Exhibit 7 of defendant's Brief in Opposition to Preliminary Exemption. It demonstrates that the year 2000 portion of total drug costs paid by the five plaintiffs who have participated in the plan before 2000 was 19.9%, while historically it has been 14.0%. Furthermore, the 2000 plaintiff payments were 86.4% higher than the historical average, while the MPSERS payments were only 22.1% higher than the historical average." (*Id.*)

- "Defendants discuss on page 20 of their BRIEF the prescription drug co-pays the Plaintiffs paid from April 1 through September 30, 2000, along with the co-pays they would have paid under the pre-April 1, 2000 plan of benefits. The Plaintiffs' co-pays increased by $563 or 43% during this six-month period. MPSERS enjoyed the benefit of this $563 as a reduction in its costs." (PA 72a - 81a.)

- "It is my opinion that the new prescription drug program is a significant diminution in the value of the health insurance benefits to which retirants and beneficiaries of the MPSERS are entitled under Section 91 of the Retirement Act because, under the new program which commenced April 1, 2000, such persons are required to pay more for their prescription drugs than they were required to pay pursuant to the Retirement Board's prior drug prescription program." (PA 8a - 27a.)

- "It is my opinion that these increases in the deductibles represent a substantial diminution of the value of the health insurance benefits

> that retirants and/or beneficiaries receive under Section 91 of the Retirement Act because they must pay a higher deductible to receive their health insurance benefits." (PA 28a - 31a.)

For these reasons, it is clear that Defendants-Appellees' actions here have significantly impaired the contractual obligations owed to Plaintiffs-Appellants.

VI. DEFENDANTS-APPELLEES HAVE FAILED TO SHOW THAT THE IMPAIRMENT WAS BOTH REASONABLE AND NECESSARY TO SERVE AN IMPORTANT PUBLIC PURPOSE.

Having shown that Defendants-Appellees' actions substantially impair the contractual obligations owed to Plaintiffs-Appellants, the final step of the analysis is to examine whether the State actors have shown the impairment was both reasonable and necessary to serve an important public purpose. Defendants-Appellees have failed to do so.

This issue has not been discussed by the lower courts as each court has ended their analysis after finding no substantial impairment. All that is available on the record are stand alone self-serving statements by Defendants-Appellees espousing that the rising costs of health care will lead to financial ruination. However, there is absolutely no factual evidence on the record to support these assertions.

The burden is clearly on the State to make such a showing. US Trust Co, *supra*. It has failed to do so. As such, this Court should find that Defendants-Appellees have failed to satisfy its burden and that as a result, Defendants-Appellees' actions have violated the law. Alternatively, and at the very least, this Court should not rule on this issue due to the lack of a factual record. Such a decision should be made only after a trial on the issues.

VII. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT.

There can be little wonder why the Court of Appeals erroneously determined that Defendants-Appellees had not significantly diminished or impaired the value of the State's contractual obligation to provide MPSERS retirants with the health benefits to which they are entitled under Section 91 of the Retirement Act. That question, as will be demonstrated, *infra*, is highly factual in nature and should not have been decided by the Trial Court or the Court of Appeals absent completion of discovery and a trial.

A. Errors of the Trial Court and the Court of Appeals.

Having established the standards for granting a motion for summary disposition, as well as the standards on appeal, *supra*, it is time to examine the Trial Court's and the Court of Appeals' Opinions to determine if they comply with the stated standards. They do not.

1. The Trial Court's errors.

The Trial Court erred in (1) accepting the wrong and misleading facts presented to it by Defendants-Appellees regarding the issue of "significant impairment," (2) using the wrong standard for determining whether there had been a significant impairment, and (3) deciding the fact issues herein without giving Plaintiffs-Appellants the benefit of a trial. These errors will be discussed *seriatim*.

a. The Trial Court based its decision on admittedly dead wrong figures.

The facts relied upon by the Trial Court, and ultimately by the Court of Appeals, were by admission of Defendants-Appellees, grossly inaccurate and dead

wrong.[7] Defendants-Appellees' inaccuracies were vital to the Trial Court's final determination in this case. The Trial Court acknowledged the importance of those figures in its opinion granting Defendants-Appellees' Motion for Summary Disposition. (PA 557a - 563a.) The Trial Court's Opinion granting Defendants-Appellees' Motion for Summary Disposition spent over two full pages citing the inaccurate facts presented to the Trial Court in Defendants-Appellees' prior Exhibit K-2. (PA 548a - 551a.) The Trial Court stated that, in granting Defendants-Appellees' Motion for Summary Disposition, it was relying on the figures supplied to the Court by Defendants-Appellees in Exhibit K-2. These were precisely the same figures Defendant-Appellee MPSERS admitted in its Exhibit Q to Defendants-Appellees' main Court of Appeals brief were dead wrong. Even a cursory examination of the different amounts presented in their conflicting affidavits discloses the State presented substantially and materially wrong facts to the Trial Court. For example, the figures given on Defendants-Appellees' Exhibit K-2 of January 18, 2002, states the Medical Net Payments for the year 2000 was $352,629,420. Defendants-Appellees' figures for the same Medical Net Payments for the fiscal year 2000 in Exhibit Q to their Court of Appeals' brief was $370,140,532, a difference of over $17.5 million, or a full 5% wrong.

Even more significant are the changes in the items listed on Defendants-Appellees' exhibit which the retirants must pay, *i.e.*, drug co-payments (wrong by 9.6%), medical co-payments (wrong by 15.4%), and total deductions (wrong by 21.9%). Note also that essentially every figure presented for the years 1998,

[7]Please note p 2 of Exhibit Q to Defendants-Appellees' Brief in the Court of Appeals, in which the Attorney General admitted to the substantial inaccuracy of the facts they presented to the trial court. (PA 564a - 566a.)

1999, and 2000 in Defendants-Appellees' Exhibit K-2 was wrong as acknowledged by Exhibit Q to their Court of Appeals brief. They were not wrong by a few dollars, but in most instances by millions of dollars. Not only were their figures wrong, they were consistently wrong in the State's favor, *i.e.*, they overstated the State's relative contribution to pay for the retirants health benefits and understated the retirants' relative burden of paying for those benefits. This is precisely what this case is about. This is why the Trial Court was misled into concluding that the retirants' portion of the total cost to the health plan had remained unchanged at approximately 20% over a period of many years. That is one of the reasons why this case must be returned to the Trial Court for a proper and accurate determination of the facts necessary to decide the difficult legal issues presented herein, assuming this Court does not see fit to grant Plaintiffs-Appellants' Motion for Summary Disposition.

b. The Trial Court used the wrong standard to determine if there had been a "significant impairment."

The Trial Court erroneously compared the health plan at issue in this case with other statewide retiree plans and statewide health plans for retired school employees in other states. The Trial Court totally ignored the fact that other states and other retirement systems are not subject to the same statutory demands as MPSERS. The State of Michigan's contract with the retirants from MPSERS is controlled by the specific statutory language of Section 91 of the Retirement Act, MCL 38.1391(1), which states:

> The Retirement System shall pay the entire monthly premium or membership or subscription fee for hospital, medical surgical, and sick care benefits for the benefit of a retirant or retirement allowance beneficiary who elects

> coverage in the plan authorized by the Retirement Board and the Department.

Because of this specific statutory grant of benefits, it is improper to compare the benefits given under the MPSERS' health plan with those provided to public school employees in other states or even other public employees in the State of Michigan. The benefits provided by other states are irrelevant regarding the question of whether Michigan diminished or impaired the contract it has with its retired public school employees. Other states have different retirement statutes, different constitutional provisions, and different factual circumstances surrounding the grant of their health benefits to their retirants. In effect, what the Trial Court did was look at the health benefits MPSERS retirants received in relation to what the retirants were purportedly receiving in other states and concluded that by comparison Michigan retirants looked good. However, that is not the standard that can be used to determine whether the State "diminished" or "impaired" the contract it had with its MPSERS retirants. If that was the standard, then the State would be permitted to diminish or impair MPSERS retirement benefits at will as long as they still compared favorably with the health benefits received by similarly-situated retirants in other states. There would be, in effect, no "contract" at all.

c. The Trial Court erred by granting summary disposition to Defendants-Appellees where there were several genuine issues of material fact to be determined.

The issue as to whether a "significant impairment" has taken place in any particular action is highly factual. As shown above, Plaintiffs-Appellants' actuaries have opined in various affidavits on the issues in this case. Defendants-Appellees have done the same. Those affidavits contain conclusions which would allow a reasonable person

to conclude there are general issues of material fact which were not addressed by the Trial Court's Opinion. We ask the Court to keep in mind at this time that when considering a motion for summary disposition, the Court must consider the affidavits placed on the record in a light most favorable to the non-moving party. Radtke, *supra*; Miller, *supra*.

Had the Trial Court not ignored and overlooked these conclusions by Plaintiffs-Appellants' experts, it would have recognized numerous genuine issues of material fact that could only be decided by a trial. Many of the above material statements of Plaintiffs-Appellants' experts were not even refuted by Defendants-Appellees. Some were refuted by Defendants-Appellees' experts. In either event, critical questions of fact, which should have been resolved by a trial, were ignored by the Trial Court.

2. The Court of Appeals' errors.

The Court of Appeals' Opinion, which is the subject of this Appeal, is erroneous in several respects. That Court erred in affirming the Trial Court's grant of summary disposition to Defendants-Appellees because: (1) it relied on the same grossly inaccurate and admittedly wrong facts relied upon by the Trial Court and (2) it erroneously concluded at p 10 of its Opinion:

> The challenged action of defendants does not directly affect the terms of the contract. The Board continues to pay the entire monthly premium for health benefits for retirees as provided in §91(1), and the payment of a particular premium-*i.e.*, the "full cost" of the premium, is what is provided by statute. The alleged impairment does not alter this basic benefit to the retiree and is therefore not substantial.

PA 576a. (Footnote omitted.)

a. The Court of Appeals' Opinion is based on grossly inaccurate and admittedly wrong facts.

The Court of Appeals failed to take notice of or recognize that the facts set forth in Defendants-Appellees' Exhibit K-2 to their January 18, 2002 brief were grossly inaccurate and highly prejudicial to Plaintiffs-Appellants' case. The fact that Defendants-Appellees changed the figures contained in Exhibit K-2 through Exhibit Q attached to their Court of Appeals' brief should have indicated to the Court of Appeals that things were factually amiss in this case and there was a need to return this matter to the Trial Court for proper development of the facts through a trial. However, the Court of Appeals chose to ignore the admittedly wrong and highly prejudicial facts presented to, and relied upon by, the Trial Court.

b. The Court of Appeals' Opinion used the wrong standard to determine whether there was a "significant impairment."

The basis on which the Court of Appeals upheld the Trial Court's Opinion is wrong. The fact the Retirement Board continues to pay the "entire monthly premium" for the retirants' health benefits is, standing alone, meaningless. As Plaintiffs-Appellants' experts have opined on numerous occasions, there is a very positive and direct correlation between the deductibles and co-payments the retirants are required to pay and the monthly premiums the State must pay for the benefit. If the co-payments and deductibles are raised high enough, the premium can be significantly reduced. If the Court of Appeals' statement is taken to its logical conclusion, the Retirement Board could effectively wipe out its portion of the costs for health benefits by simply increasing the retirants' co-payments and deductibles. This is what they are continuing to do. In the summer of 2004, Defendants-Appellee Retirement

Board once again raised MPSERS retirees' drug co-pays and deductibles in a manner which further shifts the relative burden of paying for the MPSERS' health plan from the State to the retirees. (PA 591a - 602a.)

The essence of Plaintiffs-Appellants' Complaint for Declaratory Judgment is that the State, through its increases in the deductibles and co-payments, has significantly impaired their contractual health benefit. The legal questions presented herein are highly factual in nature. Plaintiffs-Appellants must be afforded a reasonable chance at trial to demonstrate that the State has significantly impaired the contractual benefits granted to them by the State.

CONCLUSION

The retirees from MPSERS are not unmindful that the State has suffered economic distress over the last few years. Many of them likewise have felt the economic pinch caused by limited financial resources. But, the larger question squarely presented here is whether the government of Michigan will be held to its promise made many years ago to the retirees when they were employees and considering their career path. When one reviews the plain, clear language set forth in the first paragraph of art 9, §24 of Mich Const 1963, in light of (1) the statements its drafters made on the floor of the Constitutional Convention of 1961-62, (2) the problems which that entirely new provision were intended to address, (3) the pronouncements of the Executive Branch of Michigan's government that MPSERS retirees' health benefits were "secure" and "protected by the Michigan Constitution," (4) the recognition by the Government Accounting Standards Board that post-employment health benefits must be accounted for on government financial statements the same as pension benefits

because they, like pension benefits, are deferred compensation for work previously performed, and (5) the pronouncements of countless courts that have accorded to health benefits the same protection as pension benefits, it is inconceivable that health benefits could not be considered anything other than "accrued financial benefits" under the Michigan Constitution.

If MPSERS retirees' health benefits do not enjoy protection from diminishment or impairment under art 9, §24, they most assuredly enjoy such protection under art I, §10 of US Const and art 1, §10 of Mich Const 1963.

This Court must do what the Trial Court and the Court of Appeals failed to do, *i.e.*, come to grips with the fact that post-retirement health benefits granted by Section 91 of the Retirement Act of 1979 are protected from impairment or diminishment by both the Michigan and federal constitutions. To hold otherwise would be unconscionable.

In the course of writing this Brief, the undersigned read countless cases regarding the issues dealt with herein. However, the following statement made by the Court of Appeals of West Virginia in Booth v Sims, 193 W Va 323; 456 SE2d 167 (1994), sums up the underlying significance of the present case about as succinctly and eloquently as any court could state it. In Booth, several state police officers commenced a mandamus action challenging the constitutionality of certain amendments to that state's public safety pension plan in violation of the non-impairment clauses in the state and federal constitutions. After a lengthy analysis of the issues, and a finding that some of the amendments did violate those non-impairment clauses, the Court concluded:

> The reason that we have spoken at such length on the subject of government pensions is that increasingly courts are government's preeminent institutional memory. American society has become increasingly volatile, and our social failures in the last twenty years have lead to a popular dissatisfaction that translates into pendulum-like changes in elected personnel at the polls. This is democracy and certainly nothing to be decried. But courts, with their life tenure (federal), long elected terms (West Virginia), or Missouri plan retention systems (many other states) are deliberately designed to provided continuity and memory.
>
> Scores of thousands of little people have organized their lives around government pensions, and while in a democracy government has an opportunity for a new life and new direction every four years, these little people do not. While what was promised thirty years ago may not be of much concern to modernists elected to change the mix of government services, cut taxes, or instantiate a new morality, what was promised thirty years ago forms the core of life for those who once upon a time believed their elected leaders.

Id at 344.

Here, we ask this Court to provide the continuity, the memory, and the conscience of our State government.

RELIEF REQUESTED

On the basis of the arguments made herein, Plaintiffs-Appellants respectfully request that this Honorable Court reverse the decision of the Michigan Court of Appeals and grant Plaintiffs-Appellants' Motion for Summary Disposition. Alternatively, Plaintiffs-Appellants request this Honorable Court to remand this case to

the Ingham County Circuit Court so that the parties may complete discovery and conduct a trial on the factual issues presented by the pleadings.

Respectfully submitted,

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